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Online dispute resolution for cross-border electronic commerce transactions: draft guidelines

Note by the Secretariat

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I. Introduction

1. At its forty-third session (New York, 21 June-9 July 2010), the Commission established a Working Group to undertake work in the field of online dispute resolution (ODR) and agreed that the form of the legal standard to be prepared should be decided after further discussion of the topic.[1]

2. At its twenty-second session (Vienna, 13-17 December 2010), Working Group III commenced its consideration of the topic of ODR and requested that the Secretariat prepare (inter alia) draft generic procedural rules for ODR in respect of business-to-business, and business-to-consumer disputes arising out of cross-border, low-value, high-volume transactions (A/CN.9/716, para. 115). At that session, the Working Group requested that the scope of application of the Rules clarify that the Rules were intended to be used as part of an ODR framework, consisting (inter alia) of one document setting out "guidelines for ODR providers and arbitrators", and another "minimum requirements for ODR providers and arbitrators, including common communication standards and formats and also including accreditation and quality control" (A/CN.9/721, paras. 52 and 140).

3. Notwithstanding various amendments to the title of those documents, the preamble of the Rules as contained in documents A/CN.9/WG.III/WP.123 (Track I), and A/CN.9/WG.III/WP.127 (Track II) refers to a dispute resolution framework that consists of (inter alia) the following documents: "guidelines and minimum requirements for online dispute resolution providers/platforms/administrators"; and "guidelines and minimum requirements for neutrals".

4. At its twenty-eighth session, the Working Group mandated the Secretariat to prepare draft guidelines for the various actors involved in facilitating or undertaking the Rules (A/CN.9/795, para. 57). This note consequently aims to provide an outline of the guidance that might be practicable, bearing in mind the types of documents listed in the preamble of the Rules as contained in documents A/CN.9/WG.III/WP.123 (Track I), and A/CN.9/WG.III/WP.127 (Track II). Such outline does not address the form such guidance may take, and in particular whether it would best take the form of general principles (see, for example, the Proposal of the Canadian delegation on principles applicable to online dispute resolution providers and neutrals, set out in document A/CN.9/WG.III/WP.114), or whether it ought to provide more detailed guidance as to how to achieve those principles.

5. Furthermore, this note does not set out "minimum requirements" for the relevant entities in the ODR process (see Preamble, Track II, document A/CN.9/WG.III/WP.127). The Working Group may wish to consider whether such requirements ought to be specified in guidelines, or whether principles set out in guidelines can be implemented according to ODR providers' own requirements.

6. As set out in further detail below, preliminary questions that the Working Group might wish to consider include: (i) the purpose of the guidelines; (ii) the relationship of the guidelines with the Rules; (iii) the intended stakeholders to which the guidelines are addressed; and (iv) the format the guidelines ought to take.

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[1] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 257.

II. Draft content of guidelines for ODR providers/platforms/ administrators

A. General

Purpose of guidelines and relationship with the Rules

7. The Working Group may wish to consider (i) the purpose of guidelines that address various stakeholders in the online dispute resolution process, and, bearing in mind that purpose, (ii) the relationship of the guidelines with the Rules. Document A/CN.9/WG.III/WP.114 suggested that guidelines ought to set out best practices for ODR providers and neutrals, while the Rules aim to establish a procedure for online dispute resolution.

8. In that context, and as further set out at paragraph 28 of document A/CN.9/WG.III/WP.127 and paragraph 10 of document A/CN.9/WG.III/WP.127/Add.1, it may be advisable not to annex guidelines to the Rules, as the legal nature and addressees of Rules and guidelines differ.

Stakeholders to whom guidelines are directed

9. At its twenty-eighth session the Working Group provided proposals in relation to the definition in the Rules of ODR providers and ODR platforms, and an alternative proposal that would provide simply for an ODR administrator, the precise definition of which would be determined, but the purpose of which term would be to define a "centralized" entity in the Rules that would maintain claimant-facing contact and responsibility for both the legal and technical elements of a dispute (see A/CN.9/795, paras. 56-57; see also A/CN.9/WG.III/WP.127, paras. 10-13, 42).

10. It is suggested that a single, simple set of guidelines ought to be addressed to the ODR platform/provider/administrator, to permit a flexible evolution of the ODR system such that guidelines would not be quickly rendered obsolete. For the purposes of this note, the word "administrator" is used to address both entities without prejudice to any decision the Working Group might take in relation to defining that entity in the Rules.

11. This note sets out draft guidance in relation to ODR administrators in section B below. Guidance to neutrals is not addressed in this note; moreover the Working Group may wish to consider whether existing guidelines in relation to the conduct of arbitrators and mediators, such as those promulgated by CIArb, IBA and various arbitral institutions, provide sufficient guidance in relation to the conduct of neutrals, and could be referred to in a simple guidance document, or whether UNCITRAL should embark on further defining the principles in relation to the conduct of neutrals.

12. The Working Group may wish to consider formulating guidelines for merchants, in addition to guidelines for actors within the ODR system. Merchants will play a critical role in using and promoting the ODR system and providing information to purchasers in relation to that merchant's use of an ODR system.

Content of guidelines

13. In considering the content of guidelines, the Working Group may wish to have regard to documents A/CN.9/WG.III/WP.110 and A/CN.9/WG.III/WP.114, which have addressed possible elements of such guidelines.

14. The Working Group may also wish to have regard to existing guidelines and protocols in the field of alternative dispute resolution and online dispute resolution. A number of these are listed on the UNCITRAL website,[2] as well as at paragraph 32 of document A/CN.9/716, which list is replicated here for ease of reference: American Bar Association Task Force on E-commerce and ADR, Recommended best practices for online dispute resolution service providers;[3] Final Report and Recommendations of the American Bar Association's Task Force on Electronic Commerce and Alternative Dispute Resolution, Addressing Disputes in Electronic Commerce;[4] Alternative Dispute Resolution Guidelines Agreement reached between Consumers International and the Global Business Dialogue on Electronic Commerce;[5] European Commission Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes;[6] and European Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes not covered by Recommendation 98/257/EC.[7]

15. This note does not distinguish between guidelines for ODR proceedings ending in a non-binding stage, and ODR proceedings that end in a binding arbitration stage, although the Working Group may wish to consider whether additional guidance would be appropriate for proceedings involving an arbitration. Nor does this note distinguish between guidance for disputes arising out of B2B transactions as opposed to B2C transactions, but it is suggested that general guidance would be equally relevant to both.

B. Proposed topics to be addressed in draft guidelines

16. Draft guidelines for ODR providers, platforms or administrators might address, inter alia, the following topics.

Fair process and independence

Fair process

17. The guidelines ought to emphasise, by way of basic principles, that all disputing parties in the ODR proceedings are entitled to a fair ODR process.

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[2] www.uncitral.org/uncitral/publications/online_resources_ODR.html.
[3] www.abanet.org/dispute/documents/BestPracticesFinal102802.pdf.
[4] www.abanet.org/dispute/documents/FinalReport102802.pdf.
[5] www.gbd-e.org/pubs/ADR_Guideline.pdf.
[6] COM (1998) 198 final — Official Journal L 115 of 17.4.1998.
[7] COM (2001) 161 — Official Journal L 109 of 19.4.2001.

Neutrality and independence of ODR providers, platforms and neutrals

18. Guidelines could underline the principle of neutrality of the various stakeholders in the ODR process, and establish clear procedures in relation to challenges to neutrality (see A/CN.9/WG.III/WP.114, Principles 2 and 3).

Modification of the Rules and logos

Modification of the Rules

19. Guidelines might address the possibility of ODR administrators modifying the Rules in relation to minor logistical points (for example, modifying timelines set out in the Rules), and/or in relation to more fundamental modifications (for example, offering only a Track I or a Track II proceeding, but not both). Guidelines might wish to address the desirability of any consequential amendments to the title or marketing of the Rules further to any such modifications being made.

20. Guidelines could clarify that the Rules, in the form used by the ODR provider, ought to be clearly and easily available on the ODR provider's website.

United Nations logo

21. It is suggested that guidelines ought to address the fact that whilst an administrator would in no circumstances be entitled to use the UNCITRAL or other United Nations logo to promote its use of the Rules, it would be able to state that it is using the UNCITRAL ODR Rules as a basis for its dispute resolution procedure (see para. 12, document A/CN.9/WG.III/WP.124).

22. The Working Group might wish to bear in mind that no oversight mechanism exists within the system being designed in relation to the work and functioning of ODR administrators, although as set out in paragraph 13 of document A/CN.9/WG.III/WP.124, private or government entities might decide to take on such an oversight role.

Transparency/publication/disclosure

Publication of information relating to operational matters

23. Principle 4 of document A/CN.9/WG.III/WP.114 proposes that the ODR provider "shall publish, on its website, [clear, comprehensible, and accurate information, including] its fees, ODR procedures, potential recourses against decisions, enforcement procedures, complaint handling processes against the ODR provider or neutral and practices regarding the treatment of information. This information is brought expressly to the attention of users prior to their acceptance of the ODR process."

24. In addition to those categories of information, the Working Group also may wish to consider that the ODR administrator ought to make public and easily accessible: (i) lists of neutrals and information in relation to its neutrals; (ii) a breakdown of fees and costs it charges to parties; and (iii) any financial relationship between the administrator (or ODR provider or platform specifically) and merchants; (iv) ODR administrators' data protection and privacy policies; (v) the language or languages in which the proceedings can be conducted by that ODR administrator; (vi) the content of rules it is using, whether those be the UNCITRAL

ODR Rules or a modified version thereof; and (vi) the time frame for each stage of proceedings. Many of these matters are addressed further below.

Statistics and/or other information about the award

25. The Working Group may wish to consider what type of information in respect of recommendations and awards the ODR provider ought to be encouraged to make public. The Working Group has previously considered whether it would be desirable or practical for the ODR administrator to publish awards, with due exclusion of identifying information of parties; or to publish the reasoning set out in awards (see A/CN.9/739, para. 135, A/CN.9/762, para. 39; see also Principle 7 of A/CN.9/WG.III/WP.114).

26. The Working Group has also considered whether, and likely as an alternative, statistics ought to be aggregated on an anonymous basis and published per ODR provider (A/CN.9/769, para. 98). It has also been suggested that the publication of statistics and summaries of decisions in relation to ODR proceedings was a matter to be addressed in a document setting out guidelines for ODR providers (A/CN.9/769, para. 98). It is suggested that, at least for Track II proceedings, the publication of statistics, rather than any detailed publication of recommendations or the reasoning therein, would be a more useful metric for consumer or other public reference.

27. If the Working Group decides that publication of statistics is desirable, it may wish to consider what types of statistics ought to be published, bearing in mind both benefit to the public and the burden to the ODR administrator of so publishing these. Examples of what such statistics might address include: number of disputes solved in favour of sellers/purchasers; the average time for resolving a dispute; and the percentage of cases resolved at the first, second or third stage of proceedings.

28. Guidelines might provide that statistics ought to be published at a certain frequency and in a way that permits easy inspection by the public.

Contracts and relationships with other entities in the process

29. An area that might warrant consideration in guidelines for ODR administrators is whether the existence, and possibly the content, of any contract or financial relationship it maintains with merchants, be made publicly available.

30. The Working Group may also wish to consider whether the relationship between an ODR provider and an ODR platform (and the nature of that relationship: e.g., contractual, or whether the ODR provider and platform form part of the same entity) ought to be specified. Information that might be made publicly accessible could include which entity is responsible for which elements of the online proceeding; the Working Group will recall that it discussed that issue in the context of liability of an ODR platform or provider for the conduct towards end-users (see A/CN.9/WG.III/WP.127, para. 12; A/CN.9/795, para. 53).

Relationship with neutrals

31. Guidance might be provided as to an ODR administrator's relationship with neutrals, including guidance in relation to selection practices, methods of ensuring neutrals' neutrality, and the qualifications required of a neutral, as well as the need

to ensure transparency of its standards in this respect. The Working Group suggested at its twenty-seventh session that guidance for ODR providers could address issues of timeliness of neutral decision-making including, for example, replacement of the neutral should he or she fail to undertake his or her duties in a timely way (see A/CN.9/769, para. 96).

32. In relation to an ODR administrator's selection of neutrals, the draft Rules no longer require neutrals to be selected from a qualified list maintained by an ODR provider, but the Working Group considered that as ODR administrators might maintain such lists in practice, that the guidelines might wish to address such lists (A/CN.9/795, para. 126), and in particular, whether the names and identifying information of each neutral and any other relevant information in relation to that neutral (see also draft article 9 of the Rules as contained in paragraph 8 of document A/CN.9/WG.III/WP.127/Add.1). The Working Group may wish to consider, however, whether providing such information publicly would in practice be of assistance to users of online dispute resolution processes.

Confidentiality, processing and transfer of information, data security, and archiving

33. The Working Group may wish to consider how guidelines ought to address issues of confidentiality and data protection (A/CN.9/795, para. 123). Guidelines might also address the need for an ODR administrator to provide robust data security.

34. The Working Group may wish to consider how the processing of data ought to be addressed in the guidelines, in particular in relation to confidentiality, any transfer of data to other entities, and the availability of information in relation to the ODR provider or platform's policies in respect of such data processing.

35. Guidelines may outline the length of time ODR administrators ought to retain information, and the question of automatic deletion of data after a certain period of time.

Detail in relation to administering disputes under the Rules

Meaning of certain terms in the Rules applicable to ODR providers

36. The guidelines might address the meaning of non-specific phrases in the Rules — for example, the Rules provide for an ODR provider "promptly" to communicate acknowledgement of receipt of communications (draft article 3(6)) and to notify parties of the existence of certain communications on the platform.

37. In relation to the term "low-value", which has not been defined in the Rules or the commentary thereto the Working Group may wish to consider whether the Guidelines ought to provide generic guidance as to the meaning of that term, or whether it ought simply to provide discretion to ODR providers/administrators to set specific thresholds for disputes administered by them (see A/CN.9/739, para. 16; A/CN.9/795, paras. 25-26).

Receipt of communications in the proceedings by disputing parties

38. The Rules currently address receipt/deemed receipt, and the ability of the neutral to extend certain deadlines should it have reason to believe a communication has not been received.

39. The Working Group has previously considered whether the detail of receipt might be a matter best addressed in guidelines, including in relation to automatic acknowledgements of receipt via a platform (A/CN.9/739, para. 57). The Working Group may also wish to have regard to article 15 of the UNCITRAL Model Law on Electronic Commerce, article 10 of the United Nations Convention on the Use of Electronic Communications in International Contracts, and paragraph 183 of the explanatory note to the latter convention.

Timelines

40. Guidelines might provide detail as to the meaning of deadlines specifying "days" or "calendar days" when parties are based in different jurisdictions or time zones.

Residual authority (See also A/CN.9/WG.III/WP.110, para. 14)

41. The Working Group may wish to provide guidance as to both the extent of residual authority vested in an ODR provider, as well as, possibly, guidance on the exercise of that authority. For example, under draft article 9, paragraph (6) (of Track II proceedings, as set out in paragraph 8 of document A/CN.9/WG.III/WP.127/Add.1), where a party objects to the appointment of a neutral, the ODR provider "shall make a determination ... regarding whether that neutral shall be replaced." The Working Group may wish to consider whether, if the ODR provider is to have such residual authority, guidance is enumerated in relation to the exercise of that discretion.

Guidance to parties by an ODR provider

42. The Working Group may wish to consider whether guidelines ought to encourage ODR administrators to provide guidance to the parties to a dispute in relation to the functioning of the Rules, whether in the form of "FAQs", support hotlines, or otherwise.

43. Such party-directed information might also set out deadlines for each stage of proceedings, matters related to costs, the format in which to submit supporting evidence, enforcement of settlement agreements, recommendations by a neutral and awards by a neutral.

44. The Working Group has also suggested that an ODR administrator ought to communicate specific upcoming deadlines to parties as ODR proceedings are ongoing, to ensure that parties would be duly notified of deadlines under the Rules (A/CN.9/795, para. 110).

Compliance or "private enforcement" mechanisms

45. The Working Group may wish to consider, after determination of how the Rules ought to address compliance mechanisms (see A/CN.9/WG.III/WP.124; and para. 87 of document A/CN.9/WG.III/WP.127), the type of guidance the guidelines could usefully provide in that respect.

46. Document A/CN.9/WG.III/WP.114 proposes, as its Principle 11, "[t]he ODR provider shall take measures to encourage compliance with ODR decisions, which may include: requiring that a security be posted; seeking undertakings to comply from the [disputing] parties at the outset of the ODR process; or facilitating payments of awards".

47. The Rules in draft article 7(4) set out a similar principle, notably that "parties are encouraged to abide by the recommendation" made by the neutral, "and the ODR provider may introduce the use of trustmarks or other methods to identify compliance with recommendations." The Working Group might consider whether such encouragement to parties, and the ability of the ODR provider to introduce the use of trustmarks or other compliance methods, may be better placed in guidance to the ODR provider, or even in guidance to parties by an ODR provider (see paras. 42-44 above).

Technical issues

Technology

48. Guidelines may set out a best practice requirement for the platform to be accessible at all times, 24 hours a day, 7 days a week, 365 days a year, save for scheduled maintenance periods. Guidelines may set out corresponding extension of deadlines during maintenance periods.

49. The Working Group may wish to consider whether other technology issues or requirements should be addressed in guidelines and/or the extent to which such issues ought or are able to be prescribed.

Technical problems

50. Guidelines might address matters relating to disruption of proceedings caused by technical problems, and how to maintain the integrity of proceedings and fairness to the disputing parties in such an exigency.

Legal issues arising in the context of administering a dispute resolution

51. The Working Group may wish to consider whether the Guidelines ought to address issues of procedure only, or whether they ought also to address legal issues that might arise in the context of administering online disputes. Such issues might include:

(i) Whether, if a respondent does not participate in proceedings and a recommendation or award is issued in default, any additional steps need to be taken to ensure the respondent has been made aware of the proceedings against it;

(ii) How a settlement agreement ought to be recorded on the platform, and whether that process ought to be different prior to the appointment of a neutral, and after the appointment of a neutral (A/CN.9/WG.III/WP.127, para. 75);

(iii) Whether the place of the ODR administrator has any bearing on the ODR proceedings (analogous to a "seat" of arbitration).

52. The Working Group may wish to consider whether issues likely to be governed by national, regional or international law, such as limitation or prescription periods,

and data protection and privacy, ought to be addressed in guidelines, and if so, to what level of detail.

Language

53. The Working Group may wish to provide guidance to an ODR administrator in relation to language issues, including the need to make transparent the languages in which its services are offered (see Principle 8 of A/CN.9/WG.III/WP.114; see also A/CN.9/762, para. 71) and/or the need to ensure that its system, and neutrals are sensitive to the different language needs of its users (see A/CN.9/762, para. 74).

Fees

54. Guidelines could set out a general principle that fees and costs of the ODR process must be reasonable and transparent. In light of the global nature of the Rules and their applicability to different regions and different types of disputes (business-to-business and business-to-consumer), the Working Group may wish to consider the extent to which further guidance is desirable or possible in relation to fees and costs charged by an ODR administrator.